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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 339

MONTICELLO TOBACCO COMPANY, INC.,
Petitioner,

v.

THE AMERICAN TOBACCO COMPANY, AMERICAN SUPPLIERS, INC., PAUL M. HAHN, VINCENT RIGGIO, LIGGETT & MYERS TOBACCO COMPANY, JAMES W. ANDREWS and WILLIAM A. BLOUNT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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Argument

I. By tortuous speculation on the meaning of "direct evidence" in the opinion of the Court of Appeals (R. 4294), respondents urge that the general question of law concerning proof of an exclusion claim in a treble damage case by direct rather than by circumstantial evidence, does not exist. Petitioner shows from the record, *infra,* that this question, as to which it seeks certiorari, is definitely pres-

ent, and the action of both courts below is contrary to this Court's rule in the case of *Eastman Kodak Co.* v. *Southern Photo Material Co.*, 273 U. S. 359, 375 (Petition, pp. 9-10; Brief in Support of Petition, pp. 56 and 60). Respondents completely ignore that case, making no reference to it whatever in their briefs; and it is not mentioned in the opinion of the Court below.

II. Respondents have not refuted the existence of the evidence summarily presented by petitioner (Petition, pp. 19-40) to demonstrate the *sufficiency of the evidence* for the jury, in conjunction with the facts of respondents' conviction of conspiracy to restrain trade, monopolization, and conspiracy to monopolize, which the trial court admitted in evidence as *prima facie* evidence from the Lexington Judgment. Respondents' factual arguments merely *emphasize the existence of fact issues for determination by the jury,* whose province was invaded by the courts below, with consequent erroneous dismissal of petitioner's complaint as a matter of law—elaborated *infra.*

III. Respondents' argument in substance that the Lexington Judgment was available to petitioner only to establish the bare fact of their conviction of violation of the anti-trust laws, ignores the plain *observations* (*not* findings) of this Court that *the Lexington jury found* that respondents had the power and intent to exclude *undesired* competitors, and conspired to monopolize the cigarette market, *and* to fix and control prices "and *other material conditions** relating to the distribution and sale * * * of cigarettes" (Petition, p. 18), with the purpose "to maintain that monopoly if need or occasion shall offer itself to

*Petitioner's emphasis.

attempt such an exclusion" of competitors (Petition, p. 19). Petitioner briefly reiterates *infra* its position on the Lexington Judgment as an *aid in its proof of respondents' control of distributors,* and not as an estoppel fact of "actual exclusion", which was for the jury to infer in the present case with respect to petitioner.

IV. The total effect of respondents' briefs is to corroborate petitioner's position that the substantial, important general questions of law presented in the Petition, exist and merit the consideration of this Court.

I.

RESPONDENTS' STRAINED INTERPRETATION OF THE TERM "DIRECT EVIDENCE" IS NOT SUSTAINED BY THE RECORD, WHICH CLEARLY SHOWS DISMISSAL OF THE COMPLAINT FOR LACK OF *DIRECT EVIDENCE* OF RESPONDENTS' CAUSATION OF EXCLUSION OF PETITIONER FROM COMPETITION.

The Trial Court stated that there was no *direct evidence* of communications by the respondents to the distributors (R. 4284, Liggett Brief p. 15).

The Court of Appeals held (R. 4293; 197 F. 2d, p. 631) that *direct evidence* was essential to a "showing of causal connection between the collusion and the jobbers' refusal to handle plaintiff's product". It then concluded that petitioner was forced to rely on the Lexington Judgment to show the "essential element" of "some connection between Monticello's failure and defendants' proven conspiracy"—

> "for none of the jobbers who testified *admitted* to pressure by defendants" (Petitioner's emphasis).

Obviously, both lower courts predicated dismissal of the complaint on the lack of *direct evidence,* such as *admissions of pressure* by the respondents from the mouths of the distributors, or proof of *communications* by the respondents to the distributors directing them not to handle petitioner's product.

The lower courts ignored the *circumstantial evidence* or *collocation of circumstances** presented by petitioner *de novo,* and *independent of any facts by estoppel from the Lexington Judgment,* but invaded the province of the jury to *conclude on the facts* that petitioner failed to secure distribution because of its own inadequacy, rather than the concerted acts of exclusion by respondents and the controlled distributors.

Such invasion was prohibited by this Court's decision in the *Eastman Kodak Co.* case (273 U. S. 359, 375):

> "* * * 'Clearly', as was said by the Court of Appeals, *'it could not be held as a matter of law that the defendant was actuated by innocent motives rather than by an intention and desire to perpetuate a monopoly.'* This question was submitted under proper instructions. *And the weight of the evidence being in such case exclusively a question for the jury,* its determination is conclusive upon this question of fact * * *". (Petitioner's emphasis)

In that case, there was no *direct evidence* of the defendants' refusal to sell to the plaintiff in pursuance of a purpose to monopolize. Here, absent *direct evidence* of the motives of the distributors in refusing to handle petitioner's product,

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*In *United States* v. *Manton,* (Cir. 2) 107 F. 2d 834, the court below held that the common plan of conspirators may be revealed by a "collocation of circumstances".

it was for the jury to determine whether they were innocent or actuated by respondents' control of them.

II.

RESPONDENTS' BRIEFS CONFIRM THE AVERMENTS OF THE PETITION TO THE EFFECT THAT PETITIONER'S EVIDENCE *DE NOVO*, COUPLED WITH ADMISSION OF THE LEXINGTON JUDGMENT FOR LIMITED EFFECT, PRESENTED TO THE JURY REASONABLE ALTERNATIVE INFERENCES, WHICH WERE REMOVED FROM ITS DETERMINATION BY DISMISSAL OF THE COMPLAINT.

To meet petitioner's demonstration that there was adequate circumstantial evidence to go to the jury on the issue of its exclusion by respondents, they stress certain circumstances as having conclusive factual effect. *They fail completely, however, to show that any of these circumstances were known to the distributors or influenced them.* In effect, they ask this Court to refuse certiorari by finding the facts adversely to petitioner, whereas *petitioner has submitted its summary of evidence* (Petition, pp. 19-40) *only to present the question of law of the sufficiency of the evidence for the jury.*

In their approach to a conclusive factual result in their favor, respondents tend to distort the force of the "facts" relied on by them, as several illustrations will manifest:

Hartley's conviction of larceny was fully explained to the jury as having occurred many years before the petitioner's exclusion from competition, and involved his imprudent use of self-help to recover what he deemed to be his property in an automobile previously purchased by him as a gift for his wife, and which had been transferred without

his consent to a male friend of his wife (R. 2684, ff. 7743, 8221, 8269).

If it were to rely on the Lexington Judgment at all, petitioner had to wait until this Court's decision made it final. It was certainly for the jury to decide whether petitioner's suit was in good faith or to secure a "financial windfall" from respondents' conviction to cover its "failure", as charged by respondent American (p. 15, American Brief).

As to respondents' reliance on Hollingsworth's testimony to show *conclusively* the inadequacy of petitioner's management, it fails to serve that purpose. Hollingsworth found petitioner's promotion procedures sound (Petition, pp. 29-30). *He testified that the "conventional" way to secure distribution was through the jobbers.* He also said that retailers could be sold direct, but did not suggest that, other than to attempt initial distribution this way, it could be *practicably* done indefinitely (R. 3636-37, ff. 10907-908, 10910-911). *Even respondent Riggio conceded that both large and small manufacturers had to have the jobbers to distribute their cigarettes* (Petition, p. 24; Record, 315, f. 944; 338-342). Petitioner *did* sell direct to retailers, but, like its competitors, needed the direct list jobbers for distribution on an effective level (PX 132, Record 2176; PX 152-155, Record 2688-90).

Assuming arguendo that every jobber would testify that refusal to handle the Monticello cigarettes was because of belief that money could not be made on them, it would still be for the jury under the rule of the *Eastman Kodak Co.* case to decide whether refusal was innocently motivated.

The inference of exclusion of petitioner was categorically before the jury in the following manner (putting aside the other circumstances warranting such inference):

Metropolitan Tobacco Company, the largest New York distributor, servicing 30,000 retail outlets and handling the respondents' burley cigarettes for many years, refused distribution to petitioner's salable, good quality, unadulterated, non-burley Monticello cigarettes, *at the very time it gave distribution* to the newly launched Regents cigarettes of Frank Riggio, son of convicted respondent, Vincent Riggio, and as of 1939 very recent former director of sales of respondent, The American Tobacco Company; notwithstanding Monticello cigarettes were ordered by Metropolitan's customers and afforded greater profit (Petition pp. 24, 25, 26, 32-34). Also, there was Crean's experience with Faber, Coe & Gregg, whose head was most intimately connected with respondent, American Tobacco Company, as *director* and business associate of American's officers (Petition, pp. 36-38).

Having before it the facts that the 6,000 distributors servicing the 1,000,000 retail outlets, were the "direct list" customers of respondents and subject to control by them (Petition pp. 20-24), and that respondents had been convicted of unlawful conspiracy in restraint of trade, monopolization, and conspiracy to monopolize (which conspiracies were in operation when petitioner commenced business), **the jury should have been permitted to weigh whether, under all the circumstances, petitioner solicited sufficient distributors or whether further efforts would have been futile. The present case does not involve "speculation run riot" or speculation doing "duty for probative facts."**

Respondents' arguments that petitioner failed to secure distribution because of its own shortcomings boil down to the contention that it made only a "half-hearted" sales effort to challenge the respondents' control of the distributors. The fact of this control was settled at Lexington (Petition,

pp. 8-9, 18-19) and petitioner offered its evidence *de novo* to establish it again in the present case (Petition, pp. 20-24, 32-39).

Respondents seek to evade the issues of their control of the distribution system and the exclusion of petitioner by asserting that petitioner was not a competitor, because its non-burley cigarette was to be sold at a retail price three cents per pack higher than their "popular brands", and petitioner's stock prospectus stated that it did not intend to compete with the "popular brands". Clearly, petitioner did not seek a market for its cigarette at a price as low as respondents' brands; but respondents simply ignore the fact that petitioner *was* their competitor for public taste with its unadulterated, non-burley cigarette at a *higher* price (Petition, pp. 24-25; R. 2880, 8638-39).

Contrary to the contention of respondents, the trial court clearly expressed the view that there was no basis for the inference that petitioner was excluded by them, because the evidence at Lexington did not show that respondents ever directed distributors to stop distributing a brand on penalty of being removed from the profitable "direct list", the court saying, "they never did that" (Record, 155; 159, f. 477). For the trial court's further views in this regard, attention is called to page 41 of the Petition, pointing to the record where the colloquy clearly shows the mind of the court.

Petitioner submits that the Petition amply demonstrates that there were substantial fact issues, which were taken from the jury by the courts below contrary to the rule of the *Story Parchment Co.* case (Brief in Support of Petition, pp. 59-60).

III.

THE TRIAL COURT DENIED PETITIONER THE ULTIMATE FACTS ESTABLISHED BY THE LEXINGTON JUDGMENT, WHICH WERE *PRIMA FACIE* EVIDENCE OF RESPONDENTS' CONTROL OF DISTRIBUTORS.

Bearing in mind that petitioner entered business *during* the course of respondents' monopolization and conspiracy to monopolize, petitioner contends that it is no answer for the respondents to argue that the Lexington Judgment proved only a conspiracy to exclude by price-fixing. Even if that were so, the power to control distributors for such purpose, would afford the jury a reasonable basis to infer the power and intent to exclude other brands, such as petitioner's. According to the argument of respondents, their inability to determine which means the Lexington jury found were used to effectuate the conspiracy, entails equal inability to determine the ultimate facts found, which this court had no difficulty in observing (Petition, pp. 18-19).

There is, therefore, no force to the contention that the Lexington Judgment is entirely inadequate to furnish petitioner *any* facts by estoppel showing control of distributors by respondents, in aid of its *prima facie* case.

IV.

RESPONDENTS' FACTUAL APPROACH LEAVES NO DOUBT THAT IN ADDITION TO THE OTHER GENERAL QUESTIONS OF LAW PRESENTED, THERE IS THE IMPORTANT QUESTION OF DISMISSAL OF THE COMPLAINT AS A RESULT OF ERRONEOUS INVASION OF THE JURY'S PROVINCE.

CONCLUSION

The Petition presents most meritorious grounds for issuance of the writ, which petitioner earnestly prays be granted.

Respectfully submitted,

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